

## CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Thomas Juliano	Team: Squad #6	CCRB Case #: 201903851	<input checked="" type="checkbox"/> Force	<input type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Tuesday, 04/23/2019 11:30 PM	Location of Incident: § 87(2)(b)	Precinct: 90	18 Mo. SOL 10/23/2020	EO SOL 6/9/2021	
Date/Time CV Reported Wed, 04/24/2019 1:31 AM	CV Reported At: IAB	How CV Reported: Phone	Date/Time Received at CCRB Mon, 05/06/2019 11:09 AM		

Complainant/Victim	Type	Home Address
§ 87(2)(b)	§ 87(2)(b)	§ 87(2)(b)
§ 87(2)(b)	§ 87(2)(b)	§ 87(2)(b)

Witness(es)	Home Address
§ 87(2)(b)	§ 87(2)(b)
§ 87(2)(b)	§ 87(2)(b)
§ 87(2)(b)	§ 87(2)(b)

Subject Officer(s)	Shield	TaxID	Command
1. POM Kevin Phillip	23203	955326	HBK RT
2. POM Carlos Zambrano	26943	939814	090 DET
3. POM Jonathan Arias	00329	941359	INT CIS
4. SGT Frederick Manney	04797	949938	079 PCT

Witness Officer(s)	Shield No	Tax No	Cmd Name
1. POF Shirley Rivas	01900	961169	HBK RT
2. POM Paul Asnen	21237	959461	HBK RT
3. POM Nicholas Albergo	17802	954471	HBK RT
4. POM Francisco Martireyes	15296	951972	090 PCT
5. LT Jonathan Lusky	00000	938894	090 PCT

Officer(s)	Allegation	Investigator Recommendation
A.POM Kevin Phillip	Force: Police Officer Kevin Phillip used physical force against § 87(2)(b)	§ 87(2)(b)
B.POM Kevin Phillip	Force: Police Officer Kevin Phillip restricted § 87(2)(b)'s breathing.	§ 87(2)(b)
C.POM Jonathan Arias	Abuse: Police Officer Jonathan Arias searched § 87(2)(b) in Brooklyn.	§ 87(2)(b)
D.SGT Frederick Manney	Abuse: Sergeant Frederick Manney searched § 87(2)(b) in Brooklyn.	§ 87(2)(b)
E.POM Carlos Zambrano	Abuse: Police Officer Carlos Zambrano searched § 87(2)(b) in Brooklyn.	§ 87(2)(b)
F.SGT Frederick Manney	Abuse: Sergeant Frederick Manney searched § 87(2)(b) in Brooklyn.	§ 87(2)(b)
G.POM Jonathan Arias	Abuse: Police Officer Jonathan Arias failed to provide § 87(2)(b) with a business card.	§ 87(2)(b)
H.SGT Frederick Manney	Abuse: Sergeant Frederick Manney failed to provide § 87(2)(b) with a business card.	§ 87(2)(b)

Officer(s)	Allegation	Investigator Recommendation
I.POM Carlos Zambrano	Abuse: Police Officer Carlos Zambrano failed to provide § 87(2)(b) with a business card.	
§ 87(2)(g), § 87(4-b)		
§ 87(2)(g), § 87(4-b)		
§ 87(2)(g), § 87(4-b)		
§ 87(2)(g), § 87(4-b)		
§ 87(2)(g), § 87(4-b)		

### Case Summary

On April 24, 2019, Sgt. Andrew Dorsett of the Housing Bureau Brooklyn Response Team called IAB to report this incident under IAB log § 87(2)(b). On May 6, 2019, the case was received at the CCRB.

On April 23, 2019, § 87(2)(b) got into an argument with his wife, § 87(2)(b) in § 87(2)(b)'s apartment located at § 87(2)(b) in Brooklyn. § 87(2)(b) left the building and found PO Kevin Phillip and PO Shirley Rivas of Housing Bureau Brooklyn Response Team and invited them into her apartment. PO Phillip and PO Rivas ordered § 87(2)(b) to leave the apartment. PO Phillip pushed § 87(2)(b) onto the couch and restricted his breathing (**Allegation A and B – Force: § 87(2)(g)**). PO Phillip requested assistance and officers from the 90<sup>th</sup> Precinct, including PO Jonathan Arias, Sgt. Frederick Manney, PO Carlos Zambrano, and PO Francisco Martireyes responded to the location. PO Arias and Sgt. Manney asked § 87(2)(b) to search her apartment (**Allegations C and D – Abuse of Authority: § 87(2)(g)**). Sgt. Manney and PO Zambrano searched § 87(2)(b)'s locked box (**Allegation E and F – Abuse of Authority: § 87(2)(g)**). Following the searches, PO Arias, Sgt. Manney and PO Zambrano did not provide § 87(2)(b) with business cards (**Allegations G, H, and I – Abuse of Authority: § 87(2)(g)**).

§ 87(2)(g), § 87(4-b)

§ 87(2)(b) was arrested and charged with trespassing, violating an order of protection, resisting arrest, obstruction of governmental administration, and harassment (**BR 27**). § 87(2)(b)

BWC videos from officers, including PO Phillip, PO Rivas, and PO Zambrano were received and can be found in IAs #81-106. Summaries of the footage can be found in IA 107 (**BR 03**).

### Findings and Recommendations

**Allegation A – Force: Police Officer Kevin Phillip used physical force against § 87(2)(b)**

**Allegation B – Force: Police Officer Kevin Phillip restricted § 87(2)(b)'s breathing.** It is undisputed that on April 23, 2019, at approximately 11:30 p.m., § 87(2)(b) was at § 87(2)(b) in Brooklyn when he and his wife, § 87(2)(b) got into a verbal argument. The apartment was in a NYCHA facility and § 87(2)(b) was not on the lease. It is undisputed that § 87(2)(b) allowed the officers to enter the apartment. It is further undisputed that PO Phillip and PO Rivas ordered § 87(2)(b) to leave the apartment repeatedly and that he refused to do so. It is undisputed that § 87(2)(b) resisted PO Phillip's attempts to place him in handcuffs. Lastly, it is undisputed that during the struggle, § 87(2)(b) went further back into the apartment and did not witness this part of the incident. An entry allegation has not

been pled as neither § 87(2)(b) nor § 87(2)(b) disputed the fact that § 87(2)(b) allowed the officers to enter her apartment.

PO Rivas' BWC footage, starting at the 02:16 mark of the timestamp visible at the bottom of the screen, shows that PO Phillip told § 87(2)(b) that he was under arrest for trespass and ordered him to place his hands behind his back four times. § 87(2)(b) did not comply and told the officers that he was not going to jail, since he was not resisting arrest as he was not under arrest. PO Phillip grabbed § 87(2)(b)'s wrist. § 87(2)(b) pulled away and walked from the kitchen to the living room, away from the officers. The living room was poorly lit. PO Phillip approached § 87(2)(b) and grabbed him. § 87(2)(b) asked PO Phillip why he was touching him and again broke free from PO Phillip's grasp. PO Phillip told § 87(2)(b) twice more that he was under arrest before he, § 87(2)(b) and PO Phillip fell to the couch. It is unclear how they fell onto the couch due to the dark lighting. PO Rivas' first BWC video ends shortly after **(BR 05)**.

PO Phillip's BWC footage from the same moment similarly does now show how § 87(2)(b) PO Phillip, and PO Rivas fell to the couch. Once on the couch, the view of the camera goes black and nothing is visible for the entire time they are on the couch; however, audio is present. Between 04:04 and 07:45 of the timestamp visible on the bottom of the screen, § 87(2)(b) told PO Phillip repeatedly that he was choking him, that he was asthmatic, and that he could not breathe. § 87(2)(b) told PO Phillip that his arm was on his neck, that his stomach was on him, and that his face was smothered in the couch. § 87(2)(b) talked continuously to the officers through this portion of the video. At 06:28, PO Phillip told § 87(2)(b) that no one was choking him. At 08:29 the officers lifted § 87(2)(b) off the couch and removed him from the apartment **(BR 07)**.

In PO Rivas' second BWC video, starting at the 05:05 mark of the timestamp visible at the bottom of the screen, PO Rivas walked § 87(2)(b) out of the apartment building and to a police van where § 87(2)(b) fell to the ground and was unresponsive. The officers called an ambulance and EMTs removed § 87(2)(b) to the hospital **(BR 09)**.

§ 87(2)(b) testified that PO Phillip grabbed his right wrist and told him that he was under arrest. § 87(2)(b) kept his left arm still. § 87(2)(b) did not resist, tense up, pull away his arms, or attempt to walk away from the officers. § 87(2)(b) waited for PO Phillip to put the handcuffs on him. PO Phillip told § 87(2)(b) to stop resisting and pulled § 87(2)(b) by the arm into the living room. PO Phillip, while holding § 87(2)(b)'s right arm, pushed § 87(2)(b) onto the couch. § 87(2)(b) laid on the couch on his side with his back against back of the couch and his right arm pinned underneath him. PO Phillip placed his knee on § 87(2)(b)'s thigh and placed § 87(2)(b)'s left arm in handcuffs. PO Phillip ordered § 87(2)(b) to give him his right arm. § 87(2)(b) told PO Phillip that he could not give his right arm as it was pinned underneath him. PO Phillip ordered § 87(2)(b) to stop resisting and placed his forearm onto the side of § 87(2)(b)'s neck behind his ear. Although PO Phillip was applying pressure to the side of § 87(2)(b)'s neck and not his windpipe, § 87(2)(b) had

difficulty breathing from being pinned into the couch. PO Phillip ordered § 87(2)(b) to give him his arm. § 87(2)(b) pushed himself off the couch slightly so that he could breathe. § 87(2)(b) stated that he could not breathe, was not resisting but was trying to provide his arm. § 87(2)(b) became dizzy and saw approximately three additional officers, enter the apartment and push PO Phillip off § 87(2)(b). PO Phillip had his forearm on the side of § 87(2)(b)'s neck for approximately 90-120 seconds. After PO Phillip was off § 87(2)(b), § 87(2)(b) was able to sit up slightly and the officers placed him into handcuffs. § 87(2)(b) viewed officers' BWC footage and § 87(2)(b) acknowledged that he pulled his hands away from the officers because he did not know why he was being arrested. § 87(2)(b) further recalled that PO Phillip did not drag him into the living room as he had earlier testified, and that he had walked into the living room on his own **(BR 02)**.

§ 87(2)(b)'s medical records (Privileged) note that on § 87(2)(b), § 87(2)(b) was taken to § 87(2)(b) Hospital in NYPD custody. He reported that he passed out in police custody and complained of light headedness and chest pain. The nurse noted that he had no visible signs of visible injuries and that he was argumentative. He was discharged at 4 a.m. He was diagnosed with musculoskeletal chest pain, deemed stable, and told to follow up with his primary care provider **(BR 10)**.

PO Phillip testified that after he determined that § 87(2)(b) was under arrest, he grabbed § 87(2)(b)'s right wrist. He attempted to grab § 87(2)(b)'s left wrist, at which point § 87(2)(b) pulled his hands away, causing PO Phillip and § 87(2)(b) to lose balance and unintentionally fall onto the couch. § 87(2)(b)'s left arm was pinned under him. PO Phillip did not lose grip of § 87(2)(b)'s right arm and his left arm was pinned under him. § 87(2)(b) attempted to pull his right arm away from PO Phillip and began kicking his legs. PO Phillip placed most of his weight on § 87(2)(b)'s knees to stop him from kicking. § 87(2)(b) moved his left arm out from underneath himself and unsuccessfully attempted to punch backwards toward PO Phillip. PO Phillip grabbed § 87(2)(b)'s left wrist and held it behind § 87(2)(b)'s back. PO Phillip gave multiple orders to stop resisting, § 87(2)(b) did not comply and complained he could not breathe, and he was being choked. PO Phillip placed no pressure on § 87(2)(b)'s neck or any part of his body other than his legs. PO Phillip did not choke him. PO Phillip's chest did not contact any part of § 87(2)(b)'s body. § 87(2)(b)'s face was outward and was not pressed against anything. § 87(2)(b)'s airway was not restricted. § 87(2)(b) was yelling freely without any loss of breath, which led PO Phillip to believe that § 87(2)(b) had no trouble breathing. PO Phillip called for assistance over the radio. PO Rivas opened the front door and waited for additional units to respond. § 87(2)(b) moved his shoulders and body to get away from PO Phillip. PO Phillip did not change positions until backup came as he did not want § 87(2)(b) to be able to escape **(BR 07)**.

PO Rivas' testimony was generally consistent with PO Phillip. However, PO Rivas testified that § 87(2)(b) dropped his own weight onto the couch to prevent the officers from handcuffing him. PO Phillip only pulled § 87(2)(b)'s arms behind his back and did not apply pressure to § 87(2)(b)'s neck or back or restrict his breathing in any way **(BR 08)**.

The TRI prepared by PO Phillip notes that he used force on § 87(2)(b). While the TRI notes the use of an impact weapon – PO Phillip testified that it was an error and § 87(2)(b) did not allege the use of an impact weapon. In the injury section PO Phillip wrote, “Allegation of choking. BWC indicates that no chokehold was used” (BR 09).

§ 87(2)(g)

§ 87(2)(b) BWC footage shows that § 87(2)(b) lost consciousness which § 87(2)(b) attributed to an asthma attack, his medical records show that he was only diagnosed with musculoskeletal chest pain § 87(2)(b) § 87(2)(g)

**Allegation C – Abuse of Authority: Police Officer Jonathan Arias searched § 87(2)(b) in Brooklyn.**

**Allegation D – Abuse of Authority: Sergeant Frederick Manney searched § 87(2)(b) in Brooklyn.**

§ 87(2)(b) testified that after officers removed § 87(2)(b) from the apartment, additional officers, including PO Arias, PO Zambrano, PO Martireyes, and Sgt. Manney entered the residence. PO Arias asked § 87(2)(b) if the officers could search the apartment and § 87(2)(b) granted the officers permission to search. PO Arias did not tell § 87(2)(b) that she had the right to refuse the search. PO Arias did not ask § 87(2)(b) to sign a Consent to Search Report (BR 06).

PO Martireyes’ BWC footage, starting at the 00:30 mark of the timestamp of the video player visible at the bottom of the screen, shows that PO Arias asked § 87(2)(b) to search her apartment and that § 87(2)(b) consented to the search. The BWC does not show PO Arias informing § 87(2)(b) that she had the right to refuse the search nor does it show § 87(2)(b) signing a Consent to Search Report (BR 26).

PO Arias testified that he looked up § 87(2)(b)’s arrest history on his department cellphone § 87(2)(b). He asked § 87(2)(b) to search the apartment for firearms and she consented, however, he did not recall if he explained to § 87(2)(b) that she had the right to refuse the search or if he prepared a consent to search form. After watching PO Martireyes’s BWC footage, PO Arias recalled that he did not explain to § 87(2)(b) that she had the right to refuse the search and could not provide a reason why he did not. PO Arias also recalled that he did not prepare a consent to search form. PO Arias was in the stationhouse when he heard PO Phillip’s request for assistance, and he ran out to assist the officers. He did not take a Consent to Search Report with him as he did not anticipate searching the location and the Consent to Search Report is not available digitally on department

cellphones. PO Arias believed that the request to search being captured on BWC could substitute for a Consent to Search Report (**BR 12**).

Sgt. Manney testified that he was the anti-crime supervisor on scene and that no officer informed § 87(2)(b) that she had the right to refuse the search (**BR 17**).

NYC Administrative Code, Section 14-173 outlines various provisions officers must adhere to when obtaining consent to conduct a search (**BR 29**).

- NYC Administrative Code 14-173(a)(1) – articulate, using plain and simple language delivered in a non-threatening manner, that the person who is the subject of the search is being asked to voluntarily, knowingly, and intelligently consent to the search, and explain that the search will not be conducted if the person refuses to consent to the search;
- NYC Administrative Code 14-173(a)(2) – must obtain consent without threats or promises of any kind being made to the individual;
- NYC Administrative Code 14-173(a)(3) – must affirm that the individual understands the information communicated as per Subsection (a)(1);
- NYC Administrative Code 14-173(a)(4) – must refrain from conducting such search where consent has not been obtained; and
- NYC Administrative Code 14-173(b)(2) – Document the time, location, and date of such search, and the apparent race/ethnicity, gender, and age of the person who was the subject of such search, and such officer’s name, precinct, and shield number.

NYPD Patrol Guide, section 212-11 states that for all consent searches requested during a level 2 encounter, officers are to prepare a Consent to Search Report, which is available in the FORMS app on all department mobile devices (**BR 14**).

Although it is undisputed that § 87(2)(b) consented to the search of her apartment, the search is being analyzed under the Right to Know Act. PO Arias did not explain to § 87(2)(b) that she had the right to refuse the search, as required by NYC Administrative Code 14-173(a)(1). Additionally, Sgt. Manney was the supervisor on scene and he did not ensure that § 87(2)(b) was informed that she had the right to refuse the search. Furthermore, PO Arias did not prepare a Consent to Search Form, as required by NYC Administrative Code 14-173(b)(2). PO Arias’ statement of not having a form on him, and that the form is not available digitally on department cellphones is disproven by NYPD Patrol Guide Procedure 212-12. Furthermore, even if the BWC footage were to substitute for the Consent to Search Form, PO Arias still did not document the information required by NYC Administrative Code 14-173(b)(2) on the BWC footage. § 87(2)(g)

§ 87(2)(g)

**Allegation E – Abuse of Authority: Police Officer Carlos Zambrano searched § 87(2)(b) in Brooklyn.**

**Allegation F – Abuse of Authority: Sergeant Frederick Manney searched § 87(2)(b) in Brooklyn.**

PO Zambrano's BWC footage, starting from the 00:00 mark of the timestamp visible at the bottom of the screen, shows that PO Zambrano searched the entryway closet. At 03:18, PO Zambrano finds a black lockbox and asks § 87(2)(b) if she had the key. § 87(2)(b) tells PO Zambrano that the box belongs to § 87(2)(b) and that she did not know where the key was. § 87(2)(b) and Sgt. Manney then return with keys and give them to PO Zambrano. PO Zambrano puts the keys into the lockbox, opens it, and searches it (**BR 15**).

§ 87(2)(b) testified that she told PO Zambrano that the lockbox did not belong to her. § 87(2)(b) did not have mutual access to the safe and it solely belonged to § 87(2)(b). § 87(2)(b) found the key in the nightstand that § 87(2)(b) used and provided it to the officers (**BR 06**).

PO Zambrano initially did not recall searching the black lockbox. After reviewing his own BWC footage, PO Zambrano testified that he did not have an independent recollection of their being a black lockbox in the closet. PO Zambrano acknowledged that the video showed him opening the black lock box. He opened the box, despite § 87(2)(b) explaining to him that the box did not belong to her and that she did not have the key for it, because eventually § 87(2)(b) provided the key for the box and PO Zambrano believed that it allowed him to search the box and he was looking for a firearm. PO Zambrano did not ask § 87(2)(b) at any point to search the box. PO Zambrano did not recall if Sgt. Manney gave him any instructions on what to do with the lock box (**BR 16**).

Sgt. Manney testified that § 87(2)(b) pointed out to the officers the belongings that belonged to her and the belongings that belonged to § 87(2)(b). Sgt. Manney did not recall if the officers searched any belongings that § 87(2)(b) said belonged to her. Sgt. Manney found a lockbox in the closet. § 87(2)(b) told the officers that the lockbox did not belong to her and provided the officers with keys for the lockbox. Sgt. Manney did not recall if it took time for § 87(2)(b) to find the keys or if she had to look for them. After reviewing the BWC footage, Sgt. Manney's recollection of § 87(2)(b) looking for the key had been refreshed. Sgt. Manney stated that because § 87(2)(b) eventually found a key to the lockbox, Sgt. Manney felt that she could consent to the search of the box. Sgt. Manney did not recall where § 87(2)(b) found the key (**BR 17**).

According to People v. Gonzalez, 88 N.Y.2d 289 (1996), a third party can only consent to a search of a location in which they have a common authority, as defined by the mutual use of the location and having joint accessor control for most purposes. A third party cannot consent to the search of a space to which they have no common authority (**BR 18**).

The BWC shows that § 87(2)(b) made it clear to the officers that she did not have access to § 87(2)(b)'s lockbox, which was further evidenced by § 87(2)(b) providing the officers with different sets of keys to try. § 87(2)(g) both Sgt. Manney and PO Zambrano took part in searching the lock box, and neither Sgt. Manney nor PO Zambrano asked § 87(2)(b) for permission to search his lockbox. § 87(2)(g)



**Allegation G – Abuse of Authority: Police Officer Jonathan Arias failed to provide § 87(2)(b) with a business card.**

**Allegation H – Abuse of Authority: Sergeant Frederick Manney failed to provide § 87(2)(b) with a business card.**

**Allegation I – Abuse of Authority: Police Officer Carlos Zambrano failed to provide § 87(2)(b) with a business card.**

§ 87(2)(b) testified that the officers that searched her apartment did not provide her with business cards and that she did not ask the officers for business cards (BR 06).

PO Arias did not recall if he provided a business card to § 87(2)(b) upon the completion of the search. Sgt. Manney testified that he did not provide a business card to § 87(2)(b) and stated that he forgot to. Sgt. Manney did not recall any officer providing a business card to § 87(2)(b). PO Zambrano did not provide § 87(2)(b) with a business card because he did not understand the applicable Patrol Guide procedure at the time of the incident but has since come to understand that this was a situation in which he should have provided one. PO Zambrano did not recall if any other officer provided § 87(2)(b) with a business card (BR 12, 16, 17).

NYC Administrative Code, Section 14-174 states that officers are required to provide members of the public with business cards after law enforcement encounters, including searches of property, in which no summons is issued, or arrest is made (BR 13).

Despite the fact that § 87(2)(b) did not request business cards from the officers, given the fact that the officers searched § 87(2)(b)'s apartment, they would have been required to provide them to § 87(2)(b) under NYC Administrative Code, Section 14-174. Sgt. Manney and PO Zambrano both acknowledged that they did not provide § 87(2)(b) with a business card and acknowledged that they were required to in this situation. § 87(2)(g) PO Arias did not recall if he provided a business card to § 87(2)(b) given that § 87(2)(b) testified that no officer provided her with one, and that Sgt. Manney did not recall any officer providing § 87(2)(b) with a business card. § 87(2)(g)

§ 87(2)(g) the officers took part in the search of § 87(2)(b)'s residence and did not provide her with a business card. § 87(2)(g)

§ 87(2)(g), § 87(4-b)

§ 87(2)(g), § 87(4-b)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

#### **Civilian and Officer CCRB Histories**

- This is the first CCRB complaint to which § 87(2)(b) and § 87(2)(b) have been a party (BR 23).
- PO Rivas has been a member-of-service for four years this is the first CCRB complaint to which she has been a party.
- PO Phillip has been a member-of-service for seven years this is the first CCRB complaint to which he has been a party.
- PO Zambrano has been a member-of-service for 14 years and has been a subject in seven additional CCRB complaints and 12 allegations, none of which were substantiated. § 87(2)(g)
- PO Arias has been a member-of-service for 14 years and has been a subject in three additional CCRB complaints and nine allegations, none of which were substantiated. § 87(2)(g)
- Sgt. Manney has been a member-of-service for nine years and has been a subject in seven additional CCRB complaints and 17 allegations, none of which were substantiated. § 87(2)(g)

- This complaint was not suitable for mediation.
- On December 4, 2020, an inquiry was filed with the New York City Comptroller's Office to locate a Notice of Claim for § 87(2)(b) and § 87(2)(b). The results are pending and will be added to the case file upon receipt (**BR 24**).
- § 87(2)(b)  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Investigator: Inv. Thomas Juliano Inv. Thomas Juliano 12/9/2020  
Signature Print Title & Name Date

Squad Leader: Jessica Peña      IM Jessica Peña      4/28/2021\_\_\_\_\_

\_\_\_\_\_  
Signature                                  Print Title & Name                                  Date